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No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

At the core of this case is the question whether Congress intended CERCLA to apply to and sanction acts of transboundary pollution. Particularly in the wake of this Court's recent ruling that greenhouse gases are "air pollutants," *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1460 (2007), that question is undeniably and exceptionally important. By extending CERCLA's "responsible party" status—for the first time—to an entity that disposed of waste outside the United States, the decision below: (1) threatens to upset a longstanding tradition of resolving disputes over transboundary pollution diplomatically rather than judicially; (2) disregards this Court's decisions establishing the presumption against extraterritorial application of U.S. law; and (3) adopts a construction of CERCLA that directly conflicts with other federal appellate decisions. Each of these untoward results is a sufficient basis for a grant of certiorari.

1. Respondents are quick to dismiss the United States' and Canada's long history of resolving issues of transboundary pollution through nation-to-nation negotiations and cooperation. Indeed, respondents reduce the cornerstone of this extensive diplomatic practice, the 1909 Boundary Waters Treaty, to little more than a historical curiosity. Respondents suggest that CERCLA has "render[ed] the treaty null," Br. in Opp. of Washington 21 n.18, or, at least, "literally beside the point." Br. in Opp. of Pakootas 17.

The demise of the Boundary Waters Treaty no doubt comes as a surprise to at least one of the treaty's two signatory nations, *see* Br. of *Amicus Curiae* Canada 7 (arguing that the Boundary Waters Treaty "plainly applies in this case"), and to the Province of British Columbia, which has entered into several similar environmental cooperation agreements with neighboring States, *see* Br. of *Amicus Cu-*

riae British Columbia 13-14.[1] Respondents nevertheless deny that the decision below signals any dramatic shift from how transboundary pollution issues historically have been resolved, suggesting that "litigation has often been a means for addressing transboundary pollution between the United States and Canada." Br. in Opp. of Washington 20. That parties may have resorted on occasion to litigation to address sundry transboundary pollution problems, however, is—to use respondents' words—"literally beside the point." The question is not, as respondents frame it, whether the Boundary Water Treaty "[p]reclude[s]" the application of U.S. environmental laws. Br. in Opp. of Washington 18. It does not. The question presented, instead, is whether, given the long tradition of resolving transboundary pollution problems through diplomatic channels, CERCLA ought to be interpreted to include within "responsible parties" those whose disposal activities occur only outside the United States.

To the extent the authorities cited by respondents shed any light at all on *that* question, they tend to bolster, rather than undermine, the proposition that environmental laws should be stretched to reach transboundary pollution problems, if at all, only at the specific direction of Congress. For example, in *Ohio* v. *Wyandotte Chemicals Corporation*, 401 U.S. 493 (1971), this Court *declined* to exercise jurisdiction over a state-law nuisance abatement suit brought by the State of Ohio against out-of-state entities, including one Canadian corporation. *Id.* at 494-95. The Court pointed to the "sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand." *Id.* at 502. Noting that "many competent adjudicatory and conciliatory bodies are actively grappling with [the problem] on a more practical ba-

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[1] Just two years before CERCLA's enactment, Congress recognized "a tradition of cooperative resolution of issues of mutual concern . . . in the environmental area." United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 963, 990 (1978).

sis," this Court declined to "commit [its] resources to the task of trying to settle a small piece of a much larger problem." *Id.* at 503. When, on the other hand, courts have entertained litigation over transboundary pollution issues, it typically has been at the specific direction of Congress. *See, e.g., Her Majesty the Queen in Right of Ontario* v. *EPA*, 912 F.2d 1525 (D.C. Cir. 1990) (addressing Ontario's claim under Section 115(c) of the Clean Air Act, which requires EPA to take action when air pollutants may potentially cause injury in a foreign country).

2. Respondents contend that the well-established presumption against extraterritorial application of U.S. law has no application here because (a) the Ninth Circuit's application of CERCLA to Teck Cominco is purely domestic, and (b) the presumption does not apply where U.S. law addresses the domestic effects of foreign conduct. Both contentions are deeply flawed.

a. The private respondents maintain that "CERCLA liability is triggered not by any 'conduct' with respect to hazardous substances but by the 'release' of those substances into the 'environment.'" Br. in Opp. of Pakootas 10. Indeed, in respondents' view, under "CERCLA's sweeping, strict liability scheme," "'[c]onduct'" is not "even *necessary* to impose liability under CERCLA." *Id.* at 9, 10 (emphasis added). Respondents contend that because the CERCLA "facility" and "release" are in the United States, and Teck Cominco's conduct in Canada is irrelevant to its CERCLA liability, the Ninth Circuit applied CERCLA only domestically.

The key premise of respondents' "domestic application" argument—that conduct is completely irrelevant to CERCLA liability—is flatly contradicted by the text of the statute. Contrary to respondents' characterization of CERCLA, that statute does not simply impose liability in the abstract whenever there is a "release." CERCLA instead focuses on "covered persons," 42 U.S.C. § 9607, imposing liability only on

those who "own[ ]" or "operate[ ]" CERCLA facilities, and those who "arrange[ ] for disposal" of or otherwise "transport" hazardous waste. *Id.* § 9607(a). Without that conduct—owning, operating, arranging, or transporting—there can be no CERCLA liability. The release thus is a necessary but not a *sufficient* precondition to CERCLA liability; there must be conduct that converts one into a "covered person." Under the arranger liability provision, 42 U.S.C. § 9607(a)(3), there must be disposal by arrangement.

Here, it cannot be seriously disputed that the "disposal" activities took place entirely within Canada. *See, e.g.*, Br. in Opp. of Pakootas 8 (acknowledging petitioner's "discharge of hazardous substances into the river in Canada"); *see also* Pet. App. 107a, 115a (operative complaints alleging that the waste was "carried downstream into waters of the United States"). That was the factual predicate for the Unilateral Administrative Order ("UAO") underlying respondents' claims, *see* Pet. App. 72a ("Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter"), and for both decisions below, Pet. App. 16a, 51a.[2]

Undaunted by the decisions below or even their own pleadings, the private respondents advance the novel contention that Teck Cominco's "act of 'disposal' continued" after the initial discharge in Canada "until the contaminants came

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[2] The private respondents assert that Teck Cominco has never before argued that its disposal activities "occurred exclusively in Canada." Br. in Opp. of Pakootas 12. That assertion is absolutely false. *See, e.g.*, Teck Cominco's Mem. in Supp. of Mot. to Dismiss at 30 ("The only activity alleged as giving rise to TC Metals' liability took place through the alleged disposal of metal-bearing slag into the Columbia River. That activity occurred exclusively in Canada."). Indeed, in unsuccessfully opposing Teck Cominco's petition for permission to appeal under 28 U.S.C. § 1292(b), respondents themselves observed that Teck Cominco's motion to dismiss was predicated on the fact that the "slag it discharged into the Columbia River w[as] discharged in Canada." Resp. C.A. Answer to Pet. for Permission to Appeal at 5.

to rest . . . in the United States." Br. in Opp. of Pakootas 13. But, as shown above, respondents' newly-minted legal theory was not the factual predicate for the UAO, respondents' operative complaints, or the decisions below. And with good reason: At the time of the issuance of the UAO, binding Ninth Circuit authority made absolutely clear that CERCLA's definition of "disposal" does not include passive migration of hazardous substances. *See Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (terms defining disposal "generally connote active conduct"). It is thus unsurprising that, in the courts below, while both respondents argued that Teck Cominco had caused a CERCLA "release" from a "facility" in the United States, neither respondent even remotely suggested that Teck Cominco had disposed of waste anywhere other than in *Canada*. *See, e.g.*, Pakootas C.A. Br. 11 (Teck Cominco "discharged hazardous substances into the river in British Columbia").

b. Respondents further contend that the presumption against extraterritoriality has no effect on CERCLA because the presumption does not apply when a statute seeks to remediate domestic harms. Br. in Opp. of Pakootas 20. But this Court has never adopted so limited a view of the presumption against extraterritoriality, and, indeed, has very recently rejected it.

In *Microsoft Corporation* v. *AT&T Corp.*, 127 S. Ct. 1746 (2007), this Court applied the presumption against extraterritoriality in interpreting 35 U.S.C. § 271(f), which makes it an act of infringement to export the components of a patented invention for assembly abroad. The statute had been enacted to provide patent holders a remedy against foreign acts of infringement of their U.S.-issued intellectual property. Even though the statute sought to redress domestic injuries caused by foreign acts, the Court nevertheless found applicable "[t]he presumption that United States law governs domestically but does not rule the world." *Microsoft*, 127

S. Ct. at 1758. Indeed, in the rare instances where this Court has found that "domestic effects" precluded the application of the presumption against extraterritoriality, "it has done so because it concluded that there existed an affirmative congressional decision to allow such extraterritorial application." Br. of *Amicus Curiae* Chamber of Commerce of the United States 5 (citing *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 & n.22 (1993), and *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952)).

In a similar vein, respondents suggest that the presumption is limited to circumstances where there exists a "clash of laws" of separate sovereigns. *See* Br. in Opp. of Washington 23; Br. in Opp. of Pakootas 18. The private respondents go so far as to suggest that Justice Holmes's admonition in *American Banana Company* v. *United Fruit Company*, 213 U.S. 347 (1909), that the presumption applies to avoid "interference with the authority of another sovereign," *id.* at 356, "has been *repudiated*" by this Court's subsequent cases. Br. in Opp. of Pakootas 19 (emphasis added). This, of course, is not the case. Far from repudiating Justice Holmes's view of the presumption, in *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court confirmed that it applies to "avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164.[3]

Here, there can be no doubt that the Ninth Circuit's imposition of CERCLA liability on Teck Cominco interferes with the sovereign authority of Canada and the Province of British Columbia. Canada has repeatedly expressed its growing dismay at EPA's attempts to regulate Canadian conduct,

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[3] The State of Washington concedes as much. Br. in Opp. of Washington 26 ("The proposition is true"). And rightly so, for if this were not the case, this Court's application of the presumption to the question whether the Federal Tort Claims Act encompassed torts committed in Antarctica would be nonsensical; there is no law of Antarctica with which U.S. law could directly conflict. *Smith* v. *United States*, 507 U.S. 197, 198, 203-04 (1993).

sending a diplomatic note to the State Department protesting the issuance of the UAO, Pet. App. 100a-101a, and now, in this Court, stating that "the Ninth Circuit's decision nevertheless subjects Canadian companies, such as Petitioner, to conflicting regulatory schemes and infringes Canada's strong sovereign interest in regulating its own corporate citizens." Br. of *Amicus Curiae* Canada 12. British Columbia echoes the sentiment, observing that "[t]here is nothing in the Court of Appeals' opinion that would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation." Br. of *Amicus Curiae* British Columbia 17. The Ninth Circuit thus departed radically from this Court's cases in failing to apply the presumption against extraterritorial application of U.S. law.[4]

The presumption against extraterritoriality commands reversal of the decision below. This Court has explained that a court "*must* accept" any "reasonably permi[ssible]" reading

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[4] Respondents persistently suggest that EPA's issuance of the UAO demonstrates that the President shares their disregard for the sovereign interests of Canada and British Columbia. But the Executive's decision to take no action to enforce the UAO, and the subsequent decision to withdraw it, Pet. App. 120a, at least raise the question whether the President came to believe that EPA's initial issuance of the UAO was in error. The Court can resolve that question easily enough by calling for the views of the Solicitor General. The Solicitor General recently filed a brief stressing the President's authority to "promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law" Br. for the United States as *Amicus Curiae*, *Medellin* v. *Texas*, No. 06-984, at 8; *see also id.* at 10 (the President has a "unique role in foreign affairs," and exercises "traditional authority in judicial proceedings implicating international law"); *id.* at 12 (The "President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch"). The Solicitor General also contended that a judicial decision "effectively frustrating efforts to comply with international treaty obligations clearly warrants this Court's review." *Id.* at 8-9. The Court granted review in *Medellin*. 75 USLW 3398 (Apr. 30, 2007). Review is also warranted in this case.

of the statutory language that will avoid the extraterritorial application of U.S. law. *Empagran*, 542 U.S. at 174. In the petition, Teck Cominco explained that Section 9607(a)(3) must be read in conjunction with Section 9607(a)(4) and that, accordingly, CERCLA's arranger liability provision requires that the disposal occur at the same facility from which there is a release. Pet. 18-21. Respondents have no answer whatsoever to that argument other than to complain they have not before heard it articulated in precisely that fashion. Br. in Opp. of Pakootas 11; Br. in Opp. of Washington 14-15. But from the outset of the litigation, Teck Cominco has argued that it cannot be held liable as an arranger, *see* Mot. to Dismiss 29-31, and it is axiomatic that a litigant in this Court is not estopped from advancing "a new argument to support what has been his consistent claim." *Lebron* v. *Nat. R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Respondents' absence of substantive argument fairly indicates the materiality of the Ninth Circuit's break from this Court's decisions.

3. Respondents do not dispute that the First Circuit and the Ninth Circuit examined the same statutory language in Section 9607(a)(3)—"by any other party or entity"—and reached diametrically opposed interpretations. In *American Cyanamid Company* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), the First Circuit interpreted "by any other party or entity" as modifying the phrase "disposal or treatment," rather than "owned or possessed," *id.* at 24, while the decision below rejected that construction and inserted an "or" into the statutory text so that "by any other party or entity" might modify "owned or possessed" instead of "disposal or treatment." Pet. App. 24a. As a result of those binding and conflicting interpretations, in the First Circuit, a responsible "arranger" must *both* "own[ ] or possess[ ]" the waste *and* arrange with some "other party or entity," *see Am. Cyanamid*, 381 F.3d at 24, while in the Ninth Circuit, one may be held liable as an arranger *whether or not* he "owned or possessed" the waste

and *whether or not* he arranged with any "other party or entity." Pet. App. 28a.

Respondents nevertheless contend that there is no circuit split as to the meaning of "by any other party or entity" for this Court to address. Respondents suggest that *American Cyanamid* was concerned only with whether the defendant "owned or possessed" the waste, and that its statement that, "for arranger liability to attach, the disposal or treatment must be performed *by another party or entity*" is dictum. 381 F.3d at 24 (emphasis added). *See* Br. in Opp. of Pakootas 26-27; Br. in Opp. of Washington 12. But as the First Circuit recognized, under CERCLA's arranger provision, the questions whether an "arranger" must arrange with another party or entity, and whether an arranger must own or possess the waste, are two sides of the same coin. The two questions together turn on the construction of the phrase "by any other party or entity."

If, as the First Circuit *held*, the phrase modifies "disposal or treatment," it follows *both* that an arranger must arrange with a third party *and* that an arranger must own or possess the waste. Contrariwise, if, as the decision below holds, "by any other party or entity" expands disjunctively the preceding clause (the statute's omission of the critical "or" notwithstanding) it follows both that an "arranger" may arrange only with itself and that an arranger need not ever own or possess the waste. That, in both cases, only one result of the statutory construction was outcome-determinative does not transform the other result into an insignificant dictum. The twin results are inextricably linked to the single statutory construction giving rise to each. Accordingly, the Ninth Circuit's construction of "by any other party or entity" and its conclusion that arrangers need not arrange with "any other party or entity" conflict intractably with the First Circuit's opposing construction of the same phrase and the conclusion that follows ineluctably from that construction that the disposal

"must be performed by another party or entity." *Am. Cyanamid*, 381 F.3d at 24.

The result of the diametrically opposed interpretations of CERCLA Section 9607(a)(3) is to subject entities in the First Circuit to a different liability scheme than entities located (or sued) in the Ninth Circuit. "[T]he conflict created by the decision below will directly affect companies and industries that operate in multiple states [and] . . . who now face varying rules and potentially different outcomes with respect to a crucial liability determination." Br. for *Amici Curiae* Nat'l Mining Ass'n *et al.* 20. Restoring uniformity as to this important provision of federal law is a paradigmatic ground for the exercise of certiorari jurisdiction. *See Braxton* v. *United States*, 500 U.S. 344, 347-48 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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